No. 80-1637

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CLAY E. McELROY, WARDEN,

Petitioner,

v.

M. W. HOLLOWAY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent, being partially dissatisfied with the statement of Questions Presented by Applicant respectfully submits that the central issue is whether or not the Supreme Court of the United States should grant certiorari and review certain conclusions reached by the United States District Court for the Middle District of Georgia and the United States Court of Appeals for the Fifth Circuit. If reviewed, the questions would be whether or not the lower courts were correct in deciding that:

1. As defined by the Georgia Legislature and the Georgia Courts, "unlawfulness"—or the absence of self-defense—is an essential element of the offense of Voluntary Manslaughter; consequently, the State cannot constitutionally place the burden of negating or disproving such essential element upon the defendant.

2. The decision of the Supreme Court of the United States in *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) should be applied retroactively.

3. Given the Facts of this Case, no rational trier of fact could have found guilt beyond a reasonable doubt.

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CONSTITUTIONAL PROVISIONS AND STATUTES

> "A person commits murder when he unlawfully and with malice aforethough either express or implied causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provacation appears, and where all the circumstances of the killing show an abandoned and malignant heart."

Ga. Code §26-1101(a)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUMMARY OF ARGUMENT

The Supreme Court of the United States should not grant certiorari for the reason that the Court of Appeals below

correctly applied clear, precise and well-defined legal principles heretofore established by This Court.

I.

The Georgia trial court's charge to the jury was "burden shifting" and thus unconstitutional in that it operated so as to relieve the State from proving an essential element of the offense, and imposed upon the defendant a burden of persuasion at odds with the presumption of his innocence.

II.

The standard of review established by *Jackson v. Virginia,* 443 U.S. 307 (1979), is to be applied retroactively, as This Court has so indicated in *Pilon v. Bordenkircher,* 444 U.S. 1 (1979); *Moore v. Duckworth,* 443 U.S. 713 (1979); *Leonard M. v. California,* 443 U.S. 914 (1979); and, *Blake v. Thompson,* 444 U.S. 806 (1979).

III.

That based upon the particular facts of this case, taken in the light most favorable to the prosecution, no rational trier of fact could have found guilt beyond a reasonable doubt.

ARGUMENT

I.

AS DEFINED BY THE GEORGIA LEGISLATURE AND THE GEORGIA COURTS, "UNLAWFULNESS"—OR THE ABSENCE OF SELF-DEFENSE—IS AN ESSENTIAL ELEMENT OF THE OFFENSE OF VOLUNTARY MANSLAUGHTER; CONSEQUENTLY, THE STATE CANNOT CONSTITUTIONALLY PLACE THE BURDEN OF NEGATING OR DISPROVING SUCH ESSENTIAL ELEMENT UPON THE DEFENDANT.

The relevant portion of the Georgia trial court's charge was restated by the Court of Appeals:

> " 'I charge you further that the law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation, of justification of mitigation, or excuse, and *the burden is on the slayer* . . . to make out such circumstances to the satisfaction of the Jury . . .
>
> I charge you that when a killing is proved to be the intentional act of the defendant, the presumption of innocence . . . is removed from him and *the burden is upon him to justify* or mitigate the homicide . . . If there be no evidence introduced to show justification or excuse, and if the evidence introduced shows the homicide committed as charged in the Indictment, *the burden would then be upon the defendant* to show justification . . .' "

Appendix at 31-32, *Holloway v. McElroy*, 632 F.2d 605, 619-620 (5th Cir. 1980).

To review the constitutionality of the charge, it is necessary to examine and isolate the essential elements of Voluntary Manslaughter under Georgia law. In so doing it is necessary to consider both the definition of Murder and the definition of Voluntary Manslaughter since the definition of Voluntary Manslaughter refers to provisions of the murder statute. Murder is defined:

> "A person commits murder when he unlawfully and with malice aforethought either express or implied causes the death of another human being . . ."

Georgia Code § 26-1101(a).

Thus, there are three essential elements of Murder in Georgia:

(1) The act is unlawful, and

(2) The act is malicious, and

(3) The act causes the death of another human being.

Voluntary Manslaughter is defined:

> "A person commits voluntary manslaughter when he caused the death of another human being, under circumstances which would otherwise be murder, if he acts as the result of a sudden, violent and irresistible passion. . ."

Ga. Code § 26-1102.

Otherwise stated Voluntary Manslaughter is the same thing as Murder except the act results from a "sudden, violent and irresistible passion" instead of "malice aforethought." Thus the essential elements of Voluntary Manslaughter are:

(1) The act is unlawful, and

(2) The act is the result of a sudden, violent and irresistible passion, and

(3) The act causes the death of another human being.

In examining these various statutes, the Court of Appeals below accurately concluded:

> "As an abstract matter of statutory construction, then, we hold that the most reasonable interpretation of this statute is that unlawfulness—in the sense of absence of excuse or justification—is an essential element of the crime of murder. By incorporation, it is also made an essential element of the crime of voluntary manslaughter. Because unlawfulness is an essential element of the crime, the State would have to shoulder the burden of persuasion (but not necessarily the burden of production) in seeking to negate justification or excuse."

Appendix 56, *Holloway, supra*, 632 F.2d at 630-631.

After coming to its own conclusion, the Court of Appeals stated that they were not the "ultimate expositors of Georgia law" (Appendix at 56, *Holloway*, *supra*, 632 F.2d at 631), and then examined the construction of the "unlawfulness" requirement as given it by the Georgia Courts. After a thorough analysis of the available Georgia decisions, the Court of Appeals concluded:

> "The State has not cited, and our research has not found, any case from the Georgia courts which holds that the absence of self-defense has similarly been read out of the requirement of unlawfulness. On this issue, as on the initial question of whether unlawfulness is an essential element of the crime, we are persuaded by the logic of the *Johnson* case[1] from the Georgia Court of Appeals."

Appendix at 64, *Holloway*, *supra*, at 634.

The Court of Appeals, indicating a clear and exact under-

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[1]*Johnson v. State,* 137 Ga. App. 740, 224 S.E.2d 859, vacated, 237 Ga. 276, 227 S.E.2d 345, on remand, 140 Ga. App. 343, 231 S.E.2d 75 (1976).

standing of the principles laid down by This Court in *In Re Winship,* 397 U.S. 358 (1970); expounded upon in *Mullaney v. Wilbur,* 421, U.S. 684 (1975); and, then clearly and precisely defined in *Patterson v. New York,* 432 U.S. 197 (1977), wrote:

> ". . . it seems to us that unlawfulness—including the absence of self-defense—is an element of the offense. If Georgia includes within its murder and manslaughter laws unlawfulness as an element of those crimes, while at the same time Georgia courts require the defendant to prove lawfulness by virtue of self-defense, that construction makes the statutes' operation run contrary to the Constitution under *Winship* and *Mullaney.* Had the Georgia Supreme Court plainly construed its murder and manslaughter statutes so as to delete the unlawfulness requirement as an element of the crime . . . or had the Georgia legislature drafted its statutes to the same end, we might be compelled to a different result."

Appendix at 65, *Holloway, supra,* at 635.

However thoroughly and intelligently the Court of Appeals reasoned upon and decided this issue, that court did no more than correctly apply clear precedent established by This Court—precedent, the reasoning of which is unquestioned, and the limitations of which are firmly established.

II.

THE DECISION OF THIS COURT IN *JACKSON v. VIRGINIA,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), IS TO BE APPLIED RETROACTIVELY.

This Court in *Jackson, supra,* established the standard by which the evidence supporting a guilty verdict is to be

reviewed. This Court, as well as establishing the standard, has also decided that it should be applied retroactively. The Court of Appeals below in considering the question looked to the existing decisions of This Court and observed:

> ". . . we need not speculate further as to whether the *Jackson* standard should be applied to convictions obtained before the date of that decision. The Supreme Court has indicated by its own actions the answer to that question."

Appendix at 73, *Holloway*, *supra*, at 638.

The Court of Appeals then cited and discussed *Pilon v. Bordenkircher,* 444 U.S. 1, 100 S.Ct. 7, 62 L.Ed.2d 1 (1979); *Moore v. Duckworth,* 443 U.S. 713, 99 S.Ct. 3088, 61 L.Ed.2d 865 (1979) (per curiam); *Leonard M. v. California,* 443 U.S. 914, 99 S.Ct. 3105, 61 L.Ed.2d 878 (1979); and, *Blake v. Thompson,* 444 U.S. 806, 100 S.Ct. 27, 62 L.Ed.2d 19 (1979). These cases all involved convictions prior to *Jackson* and were either reversed and remanded for consideration in light of *Jackson,* or were reviewed under the *Jackson* standard.

In *Hankerson v. North Carolina,* 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977), This Court was presented with the question of whether or not the decision in *Mullaney v. Wilbur,* 431 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), should be given retroactive application. The inquiry was answered in the affirmative, that is, that *Mullaney* is to be applied retroactively.

The reasoning in *Hankerson* is equally applicable here. In *Hankerson* this Court reiterated its position taken in *Ivan V. v. City of New York,* 407 U.S. 203, 92 S.Ct. 1951, 32 L.Ed.2d 659 (1972) that:

> "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and

> so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect."

Hankerson, supra, 432 U.S. at 241.

Hankerson afforded *Mullaney* complete retroactive effect on the premise that it is essential to the truth-finding process that the jury receive accurate instructions on the burden of proof in a criminal case.

Whether or not *Jackson* meets the requirements for retroactive application determined by the standards set forth in *Ivan V.* and *Hankerson* seems hardly open to serious argument since nothing could have greater bearing on the accuracy of a guilty verdict than the quantity or sufficiency of the evidence of guilt. This Court in *Jackson,* 443 U.S. at 323, observed:

> "The question whether a defendant has been convicted upon inadequate evidence is central to the basic question of guilt or innocence."

This Court should not grant certiorari to review this issue because: (1) The District Court and the Court of Appeals were correct in applying *Jackson* retroactively; and (2) This Court has already so indicated its position in the matter.

III.

GIVEN THE FACTS OF THIS CASE, NO RATIONAL TRIER OF FACT COULD HAVE FOUND GUILT BEYOND A REASONABLE DOUBT.

Whether or not the above heading is true, is an issue which involves the mere application to a given set of facts of the clear and well established standard of review set forth in *Jackson, supra.*

The Court of Appeals is the third court to consider whether or not the evidence supports Respondent's conviction. The matter has also been addressed by the United States District Court for the Middle District of Georgia and by the Georgia Court of Appeals. A minority of the Judges on one court and both of the other courts have *held the evidence insufficient.* The District Court concluded:

> "Having carefully read the entire trial transcript . . . it is this Court's considered judgment . . . that the evidence . . . could not . . . reasonably support a finding of guilty . . ."

Appendix at 85, *Holloway v. McElroy*, 474 F.Supp. 1363, 1364 (M.D. Ga. 1979).

The United States Court of Appeals concluded:

> ". . . we hold, based on our independent examination of all the evidence . . . viewing the evidence in the light most favorable to the prosecution, that no rational trier of fact could have found proof beyond a reasonable doubt . . ."

Appendix at 79, *Holloway*, *supra*, 632 F.2d at 641.

Perhaps the most significant and certainly the most dramatic characterization of Respondent's trial comes from Presiding Judge Braswell Deen, speaking for the three-man dissent in the Georgia Court of Appeals:

> "It is a woeful day when the State seeks a conviction of murder on such scant evidence. It is an even sadder day when a jury returns a verdict of guilty of manslaughter on so little evidence. But it is perhaps the most regretful day of all when an appellate court gives judicial sanction to such a result."

Appendix at 104, *Holloway v. State*, 137 Ga. App. 124, 132, 222 S.E.2d 898, 903 (1975) (Deen, P.J., dissenting).

Presiding Judge Deen's observation and comment is accurate as are the decisions of the District Court and the Court of Appeals. Absent obvious and compelling error,

This Court need not supervise and review the mere application by a lower court of a legal principle which has been clearly and well established by This Court.

CONCLUSION

For the rason that the decision of the lower court is as thoughtful, comprehensive, accurate and articulate a decision as could have been written; and, for all of the foregoing reasons, a Writ of Certiorari should not issue.

Respectfully submitted,

/s/Lawrence W. Roberts
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CERTIFICATE OF SERVICE

GEORGIA, CRISP COUNTY.

I, LAWRENCE W. ROBERTS, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have this day served three (3) true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari, upon Petitioner's attorney by depositing the same in the United States mail, with sufficient first-class postage affixed and properly addressed to:

SUSAN V. BOLEYN
Assistant Attorney General
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This _____ day of _____, 1981.

/s/Lawrence W. Roberts
LAWRENCE W. ROBERTS